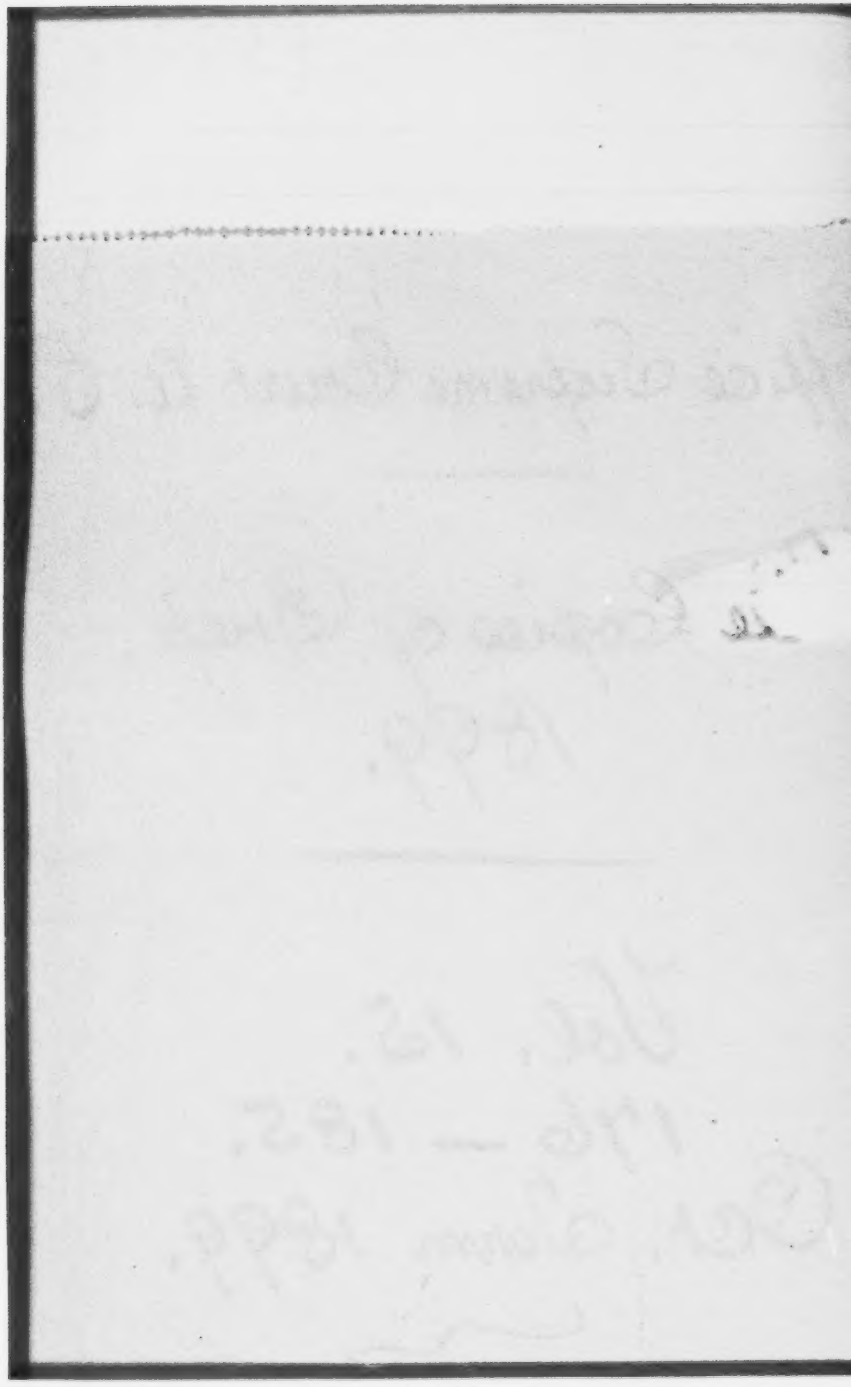

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Statement on Behalf of Edward B. Wesley, Appellant, in Opposition to Motion of J. D. M. Shaw, for Leave to File Brief and Submit Argument.

SUPREME COURT OF THE UNITED STATES,

OCTOBER TERM, 1899.

No. 176.

EDWARD B. WESLEY, APPELLANT,

vs.

HOWARD P. EELLS.

Appeal from the Circuit Court of the United States for the Northern District of Ohio.

WILLIAM H. LYLES,
Counsel for Edward B. Wesley, Appellant.

17,237.

SUPREME COURT OF THE UNITED STATES.

October Term, 1899.

No. 176.

Now comes Edward B. Wesley, appellant above named, by William H. Lyles, his counsel, and files the following statement in opposition to the motion of J. D. M. Shaw, as follows, to wit:

STATEMENT.

Appellant emphatically denies that the case above entitled is a collusive effort by the parties thereto to have this court, in an agreed case between them, decide an alleged liability of the State of South Carolina.

He admits, however, that his motive for the purchase of the property referred to in the statement of the motion as the Agricultural Hall, was to force the State of South Carolina to pay to him a small part of a large sum of money due to him by said State, and, if possible, to force the State of South Carolina into litigation to foreclose the mortgage given upon said property by J. W. Alexander and in such litigation to have it determined that said State is liable for the payment of the Revenue Bond Scrip held by appellant.

That the circumstances under which appellant became a creditor of the State of South Carolina were, under a concurrent resolution of the General Assembly of the State of South Carolina, passed at the session of 1899, thoroughly investigated by Hon. Y. J. Pope, then Attorney General of the State of South Carolina, and now adorning the Supreme Court of said State as the Senior Associate Justice thereof, and were clearly embodied in his report to the General Assembly, filed pursuant to the directions of such concurrent resolution. They can best be given by a quotation from that report:

"A HISTORY OF THESE CLAIMS THEMSELVES"

Lest I may do an unintentional injustice to these claimants, I shall consider the claims separately, and this I feel I ought to do because from one standpoint the claim of one occupies a better plane in my best judgment, and as I shall express the ground upon which I base this discrimination between the claimants hereafter, I shall content myself just now by expressing this as the reason for taking the claims up separately.

I will first examine Mr. Wesley's claim. It was very evident, I remarked some time ago, that the public—I mean the investors in public securities—had taken alarm at our money centres in view of the rapid expansion of State securities. Hence soon after 2d March, 1872, when the General Assembly of this State had passed the act providing for the retirement and cancellation of the four million of Blue Ridge Railroad bonds guaranteed by the State and the issue therefor of the one million and eight hundred thousand dollars in Revenue Bond Scrip, we find in company with the State Treasurer and the President of the Blue Ridge Railroad Company in the City of New York, two prominent bank presidents of our own State, two gentlemen who were then and have ever since been esteemed very highly and regarded as gentlemen of character and influence, I mean the late Col. L. D. Childs, President of the Carolina National Bank of Columbia, S. C., and Col. John B. Palmer, President of the Central National Bank of the same

city. No doubt these gentlemen recognized the grave crisis in our State's financial condition and foresaw the wonderful effect retirement of $4,000,000 of public securities, (I say public because when the State guaranteed the payment of the same, pledging for that purpose her faith and credit, these bonds became of that character), would produce among financiers in the City of New York, they sought out Mr. Edward B. Wesley, who, at that time, did not own one dollar of this State securities—indeed, he had refused, representing a prominent banking house in New York some time before that, to consider any proposition for interesting himself in them.

It was represented to Mr. Wesley the great importance to the finances of the State to have these $4,000,000 Blue Ridge bonds retired and with an assurance that there should be placed in his hands $1,005,000 of the Revenue Bond Scrip as collateral security for any money he should advance in the matter of withdrawing from hypothecation these Blue Ridge bonds. As a consequence he advanced the sum of three hundred and forty-four thousand nine hundred and twenty-five, ($344,925) dollars in actual cash, and with this sum he redeemed the sum of two million nine hundred and two thousand ($2,902,000) dollars of those Blue Ridge Railroad bonds with all their coupons attached. Mr. Wesley not only redeemed this large amount of such bonds, but he purchased a chisel and with his own hands so punctured these bonds and the coupons thereto attached that it was forever afterwards rendered impossible for any one to use them on the markets of the world; not only so but he saw them shipped by express to the State Treasurer where, I am glad to say, they are now in the same mutilated condition.

Mr. Wesley received one million and five thousand dollars in Revenue Bond Scrip, but he has always maintained that this Scrip was merely a collateral. I find the same statement in the Supreme Court of the United States brief as I detected in his testimony before me in New York—collateral—today, with but a slight exception, that one million and five thousand

dollars of Revenue Bond Scrip is in the vaults of the Carolina National Bank in this city, where he has retained it, according to the testimony of Col. Wilie Jones, since 1872 or 1873. I had it counted most carefully and the exact amount in the vaults of the bank is $996,840.

Mr. Wesley has not remained passive in his assertion of a claim against this State by reason of his expenditure of $344,-925. Before the revolution in 1876 he had repeatedly sought what he conceives is justice at the hands of the people's representatives in the Legislature of this State. Then efforts were made in the United States Courts culminating in two appeals to the Supreme Court of the United States. These two decisions of that tribunal will be found in *Williams vs. Hagood, 98 U. S. Reports, page 72,* and *Williams and others vs. Hagood, 117 U. S. Reports, page 52.* In the first case the opinion of the court is careful to allow another suit if these parties should so desire. The language of the court in that first cause was certainly encouraging—holding that the decision of our State Supreme Court in the case of *The State ex relatione R. C. Shiver et al., vs. Hoge as Comptroller General,* hereinbefore recited, bound no one as no holder of Scrip was a party to the suit. And in the second suit, to which alone Mr. Wesley was a party, so far as the records disclose, the action is dismissed upon the sole ground that the State of South Carolina is a necessary (party), but could not be forced into court against her will under the eleventh amendment of the Constitution of the United States, whereby States are not liable to be sued except by their own consent.

Nowhere on the merits in either case is there any expression of that court that can be tortured into a depreciation of the claim of Mr. Edward B. Wesley or Amos D. Williams."

But, notwithstanding the fact that this appellant had so advanced to the State of South Carolina so large a sum of money and had thereby relieved it from the burden of so great a debt, and held as security for his said debt the Revenue Bond Scrip above stated, the said State, by its Legislature, afterwards

passed certain acts forbidding the receipt of said Scrip for taxes due to the State of South Carolina and has persistently and constantly refused to pay the said debt or any portion of the said Scrip so held by this appellant as security therefor, notwithstanding the repeated efforts of appellant to obtain payment of the same. And she has also persistently refused to become a party to any proceeding instituted by this appellant or other holder of said Scrip, to test the validity thereof, as evidenced by the records of this court in the case of *Williams vs. Hagood, 98 U. S., 72,* and *Williams and others, vs. Hagood 117 U. S., 52*; and of the case of *The State of South Carolina Plaintiff in Error vs. Edward B. Wesley 155 U. S., 542.*

For these reasons appellant despairing of obtaining justice from said State on account of his said claim, and being advised that the property belonging to the State of South Carolina known as the Agricultural Hall property, was advertised for sale and probably worth the sum of from $15,000 to $20,000, determined to purchase the same, intending to tender his Revenue Bond Scrip in payment for the credit portion of the purchase money thereof, feeling satisfied that the State of South Carolina might accept the same or, in case of her refusal, would be forced to bring action against appellant for the foreclosure of the mortgage executed for such credit portion, and that in any such action against this appellant he could set up the validity of the Scrip tendered in payment therefor.

Appellant hoped that having the justice of his claim, which had been so recently investigated by the Attorney General of said State, and reported to the General Assembly, brought by such proceedings so strikingly to the attention of the public, the General Assembly itself would be induced to take the matter up and reach some adjustment of appellant's rights, but instead thereof, the possession of said premises, so purchased by appellant, was violently taken by the armed officers of the State of South Carolina under the orders of the Governor thereof and this appellant was forced to recover possession of said premises through the channels of the Federal Courts.

So great a lapse of time having occurred without any action taken by the State of South Carolina towards the foreclosure of the mortgage, for which the said Scrip had been tendered, and appellant being a very old man and not inclined to hold real estate so far away from his home, which is in the State of New York, reached the conclusion that he would sell the same, being advised by his counsel that the mortgage so executed upon said property and the tender of payment thereof in Revenue Bond Scrip could still be available for the purpose of determining the validity thereof should any action be brought by the State of South Carolina against the purchaser of said property for the foreclosure of the mortgage; appellant then caused the property to be widely advertised for sale in the Industrial Publication of the Southern Railway Company, widely circulated in all parts of the Union, appellant being honest in his desire to sell the said property but satisfied, upon the advice given, that such sale would not prejudice his chances of determining the question of the validity of said Scrip. That appellant's desire to sell the said property, coming to the attention of the defendant, Howard P. Eells, in some manner which the appellant does not definitely know, application was made to appellant, through his attorney, for the purchase of said property, and after negotiations, the price of $20,000 was agreed upon, and it was currently reported in the City of Columbia, S. C., where said property is situate, that the said Howard P. Eells desired to purchase the same for some manufacturing purpose, but appellant knows nothing as to the correctness of such report. Under the advice of his counsel, appellant did not, during these negotiations, inform the said Howard P. Eells of the existence of any mortgage thereon, intending, after negotiations had ripened into a contract, to propose to the said Howard P. Eells to in some way indemnify him from the existence of said mortgage and to enter into a special contract to undertake the defence of any suit that might be brought by the State of South Carolina to foreclose the same.

That having, upon the examination of the title to said premises, discovered the supposed existence of the said mortgage, the said Howard P. Eells positively declined to take the said property upon any terms that could be suggested by appellant; whereupon this action was commenced by appellant against him in the State of Ohio, which was and still is the State of his residence and citizenship, the courts of that State being the only courts having jurisdiction of the person of the said Howard P. Eells, the action brought by appellant being one to enforce a personal liability.

Appellant admits that he was much pleased at the opportunity thus afforded him of bringing an action which would test the validity of his holding of Revenue Bond Scrip above referred to and was advised by his counsel that he, (appellant), being a resident and citizen of the State of New York, would have the same right to bring the said action against the said Howard P. Eells, a resident and citizen of the State of Ohio, in the Federal Courts, as he would have had to bring such action against any resident or citizen of the State of South Carolina, and appellant admits that he was desirous of so framing the issues in said action as to present squarely to the consideration of the courts the questions as to the soundness of the objections which had been urged to the validity of his Scrip, and for that reason his counsel took special pains in laying before the attorney for the defendant, Howard P. Eells, all of the facts and circumstances attending the issue of the said Scrip and the incurring by the State of South Carolina of its liability to appellant; and appellant's counsel did succeed in convincing the attorney of the said defendant that it was useless to interpose any defence in the said action other than those going to the validity of the Scrip.

That said contract was entered into with the said Howard P. Eells in October, 1897, but appellant, being a very old man, inadvertently did not notice that the exact date of said contract had been omitted and inadvertently executed same without a date written therein; but appellant alleges that negotiations

leading up to said contract had been pending for a month or more prior to the execution of said contract. Appellant further avers that said action was brought in good faith by him to enforce the liability so incurred by defendant, appellant being honestly anxious to dispose of the said property and the said defendant, Howard P. Eells, being a business man of high standing and supposed to be of large means in the City of Cleveland, State of Ohio.

That said cause came on for trial with no further agreement between appellant, as plaintiff, and defendant, or between appellant's attorney and attorney for the defendant, than is frequently found between the litigants and attorneys in causes where there is an honest difference of opinion as to their rights and liabilities without any feeling of personal animosity of the one towards the other, and appellant is advised by his counsel that the argument of Mr. Newberry, attorney for defendant, made on circuit, was elaborate and most forcible. It certainly did convince the Circuit Court in spite of the argument made by counsel for appellant, that the Revenue Bond Scrip in question was invalid under the inhibitions of the Constitution of the United States.

Appellant having been so treated as above stated by the State of South Carolina, felt under no obligation to notify the authorities of said State of the pendency of said action, regarding it as an action for the enforcement of his private right against the defendant to compel him to take the premises in question, although it did incidentally and necessarily involve the question of the validity of the said Scrip.

That while the said cause was pending, and after the same had been submitted on written arguments to the Circuit Judge, the General Assembly of the State of South Carolina did pass the act referred to on page 4 of the Motion Papers, now under consideration, and appellant avers that he is informed and believes that the said provisions did not appear in the bill, afterwards becoming the act referred to, until the said bill was before the Committees on Free Conference of the House and

Senate of the State of South Carolina, when the attorney for the moving party, then the Attorney General of the State of South Carolina, appeared before said committee and caused the adoption of said provisions as an amendment to said bill, which afterwards became a law by its due passage through the General Assembly and ratification by the Governor, but the enactment of such provisions never came to the attention of appellant or his counsel until several weeks after the final adjournment of the General Assembly of said State, when appellant's counsel received notice, through the said Attorney General, of the action of the Commissioners of the Sinking Fund, set forth in said moving papers, the said action being altogether unsolicited on the part of this appellant and considered by him as merely a device adopted by the officers of said State to enable her to avoid the chances of having an honest and fair determination of her liabilities upon the said Scrip.

The original bond and mortgage, which had been executed by the said J. W. Alexander to the Treasurer of the State of South Carolina, were never delivered to appellant or his attorney, or, as appellant is informed and believes, to the said J. W. Alexander, and appellant is not informed whether entry of satisfaction has ever been made upon said original mortgage. He admits that the paper referred to has been recorded in the office of the Clerk of the Court of Common Pleas for Richland County, the office where said deed of mortgage had been improperly and wrongfully recorded, but appellant took no further notice of said proceeding except as hereinafter stated, considering the same to be an effort unworthy of the dignity of a great State to avoid the jurisdiction of the courts to determine fairly the question of liability to one who had honestly and fairly extended credit to her in her hour of great need.

Appellant did cause the counsel for defendant to be informed of the action which had been taken, but not having received the original bond and mortgage and with the experience he had had in the dealings of the officers of the State of South Carolina with him, could not with candor say that it

was not some device which would be afterwards repudiated by legislative authority. Appellant was informed by counsel for defendant that he was no longer willing to take the property having made other arrangements, and appellant was brought to a position where the most that he could have done would have been to file a supplemental bill, the cause being then pending before the Circuit Judge, who was holding the same under advisement, and would, even at best, have been subjected to the payment of heavy costs and expenses, but is advised and believes that he could not then have compelled the defendant to take a title at that late day, freed of encumbrances, but appellant was satisfied and still is satisfied that the said property was free from encumbrance at the time of the contract entered into with the defendant, the said mortgage having been extinguished before it was recorded by the tender of the Scrip referred to in these proceedings.

The decree of the court afterwards coming in, by which appellant's bill was dismissed, appellant was advised that he could not, even if he desired to do so, thus avail himself of the supposed action of the State authorities, and that his only recourse was to appeal from the decree. This having been done and the cause having been entered in this court, although appellant felt under no obligation to the State of South Carolina to advise her of the proceedings, did cause a letter to be addressed to His Excellency, the Governor of the State, of which the following is a copy:

"To His Excellency, William H. Ellerbe, Governor of the State of South Carolina:

Dear Sir: I desire to call your attention to the fact that there is now pending in the United States Supreme Court a case entitled, 'Edward B. Wesley, plaintiff vs. Howard P. Eells, respondent,' which squarely presents the issue as to the validity of the obligations of the State of South Carolina, known as the Revenue Bond Scrip, amounting to $1,800,000. This cause is No. 652 on the docket for the Oct. term, 1898, carried up by appeal from the Circuit Court of the United

States for the Eastern Division of the Northern District of Ohio, having been decided by Judge Ricks of that court during the fall of last year.

You are doubtless aware of the fact that $1,000,000 of that Scrip is held by Mr. Edward B. Wesley, of Port Chester, New York, and that I have been employed by him to establish, if possible, the validity of the Scrip.

Mr. Wesley advanced to the State of South Carolina in cash, $344,000, with which the Blue Ridge Railroad Bonds, amounting to nearly $3,000,000, were taken up and cancelled, and they now lie in the Treasury of the State.

He has always considered himself a creditor of the State in good faith, and has always been reluctant to be forced to take action to establish the validity of the Scrip; and, as it is certain that the decision of the issue can no longer be evaded, it is his desire as well as my own to bring the matter to the attention of the authorities of the State, and afford them an opportunity, if the State is so advised, to be represented on the argument of the cause, so that no question can be made as to its not having been well argued.

The State of South Carolina can become a party to the cause only pursuant to some act or resolution of the Legislature, as it has been held that no officer of the State can enter an appearance for her, without special authority from the Legislature. The cause will probably be reached for argument in the United States Supreme Court before the next session of the Legislature, and I now write to afford you an opportunity to bring the matter to the attention of the Legislature, and to say that, if the State desires to become a party to the litigation, and to have the question argued on her behalf, I have no doubt that I can arrange for her to do so. The defendant, Mr. Eells, was represented in the Circuit Court by Mr. A. St. J. Newberry, a lawyer of great ability, in Cleveland, Ohio, and the cause was very thoroughly argued by him, as appears from the decree, which was in favor of the defendant, and against the validity of the Scrip, upon the ground that it constituted bills

of credit inhibited by the Constitution of the United States. I, however, am very confident that I will be able to reverse the decree of the Circuit Court, and will obtain a decree of the United States Supreme Court for the specific performance of the contract with Mr. Eells, which will establish the validity of the Scrip, and I do not wish to find myself in position of having imposed upon the State an indebtedness of $1,300,000 without affording her an opportunity to defend herself against it or to adjust the claim of Mr. Wesley upon the basis of its own merits, regardless of the question of the validity of the Scrip, if she be inclined so to do.

I remain very respectfully,

(Signed) WM. H. LYLES."

But having had no reply from him, appellant caused a memorial to be addressed to each branch of the General Assembly advising it of the pendency of the action and suggesting if the State desired to be represented in said cause on her own behalf that appellant's counsel would endeavor to arrange for her to be so represented. This memorial was referred to the proper committees of the House and Senate, which reported back to their respective bodies without recommendation and no action whatever was taken thereon.

Appellant is informed and so charges, that J. D. M. Shaw, the moving party, is a countryman of but small means, not particularly interested in public affairs, and appellant charges that the said motion is not really made at his instance and request, but that his name is merely used for the purpose of making a motion at the instance and request of the State of South Carolina herself, who thus again seeks by indirect and unfair means to deprive appellant of the small return which he would receive by success in this case for the large amount lent by him for the benefit of the State.

State of New York, County of New York.

Personally appears Edward B. Wesley, appellant above named, who, being duly sworn, says that the foregoing statement is true to his own knowledge except as to the facts therein stated on information and belief and as to those he believes it to be true.

Sworn to and subscribed before me this —— day of January, 1900.

No. 176.

FILED
JAN 15 1900
JAMES H. McKENNEY
CLERK

Brief of Argument of William Hotchkiss, for Appellant, Against Motion of J. M. Shaw to File Argument.

Filed Jan. 15, 1900.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1899.

No. 176.

EDWARD B. WESLEY, APPELLANT,

vs.

HOWARD P. EELLS.

Appeal from the Circuit Court of the United States for the Northern District of Ohio.

17,237.

Argument.

I.

The statement of facts in the verified return filed herewith is so full that reference is craved to it.

The motion is made ostensibly for leave to appear and file argument. The moving party has no right to intervene and file an argument.

In the case of *Whitney vs. Hanover National Bank*, Supreme Court of Miss. April 9, 1894, 1 Am. & Eng. Dec. in Eq., p. 663, the court says: "No such practice is known in Equity as making a person a defendant to a suit upon his own application over the objection of the complainant. 1 Danl. Ch. Pl. Pr. 287. Note 2 and cases cited. *Stretch vs. Stretch*, 2 Tenn. Ch. 140., where the subject is fully treated and the action of the court in the case before us is fully vindicated on principle and authority."

In the case of the *State of South Carolina vs Edward B. Wesley*, 155 U. S., 542, the court says: "The State does not complain that it was refused leave to intervene, but that the Circuit Court without the intervention of the State refused merely upon suggestion to dismiss the complaint against the defendants who were sued as individuals. The State was not a party to the record in the Circuit Court and did not become a party by intervention, *pro interesse suo* or otherwise, but expressly refused to submit its rights to the jurisdiction of the court. This being so, the motion to dismiss may well be sustained on that ground. *United States vs. Lee*, 106 U. S., 196, 197. (27:171, 173); *Georgia vs. Jesup*, 106 U. S., 458 (27:216)."

II.

The court will not, upon the suggestion of the said J. D. M. Shaw, or upon its own motion upon the showing made, dismiss the proceeding, or even order an issue to try the fact.

In the first place we submit that the moving party comes

into court in such a manner as not to entitle him to the consideration of the court, and in the second place, we submit that it is well settled that the court cannot dismiss a suit under the Statute of 1875, upon its personal conviction, however strong, unless the facts on which its conviction is based appear upon the record and create a legal certainty of the conclusion derived from them. *Barry vs. Edmunds*, 116 U. S. 55. *Detutron vs. Young*, 134 U. S., 241.

No matter what may have been the motive of Mr. Wesley for making the contract of sale, if the contract was a *bona fide* one, intended to be enforced, the desire to make use of it to test the validity of the Scrip will not defeat it. In *Morris vs. Gilmer*, 129 U. S., 315, it was ruled: "A citizen of the United States can instantly transfer his citizenship from one State to another, and his right to sue in the courts of the United States is none the less because his change of domicil was induced by the purpose, whether avowed or not, of invoking, for the protection of his rights, the jurisdiction of a federal court."

In the case of *Tindal vs. Wesley*, 167 U. S., 209, it was expressly ruled that Mr. Wesley's intention to force an issue as to the validity of this Scrip did not vitiate his rights in the courts of the United States.

In *Lanier vs. Nash*, 121 U. S., page 410, Chief Justice Waite, delivering the opinion of the court, said:

"In this court it was claimed in argument that the transfer was collusive for the purpose of creating a case cognizable by the Circuit Court of the United States, and, therefore, should have been dismissed below under the authority of Section 5 of the Act of March 3, 1875, chap. 137, 18 Stat. at L., 470; but we find no sufficient evidence to justify us in reversing the decree and sending the suit back for dismissal. The transfer was undoubtedly made for the purpose of putting it in the power of Winslow, Lanier & Co., to bring a suit; but this, for anything that now appears, might as well have been begun in a State as in a Federal Court. The object of the bank seems

to have been, not to give jurisdiction to the Courts of the United States, but to create an ownership which would cut off the anticipated defenses of the mortgagors. That of itself is not enough to make it proper for the courts of the United States to refuse to take jurisdiction if the title made by the transfer is complete, and such as will enable the assignee to maintain a suit in his own name at all. To justify a dismissal it must appear that the object was to create a case cognizable under the Act of 1875."

In the case of *Carter vs. Greenhow*, 114 U. S., 317, reported in the L. C. P. Edition, with head notes by Justice Matthews, the ruling was "that the only mode of redress in case of any disturbance or dispossession of property, or for other legal rights based upon such violation of contract, is to have a judicial determination, in a suit between individuals, of the invalidity of the law, under color of which the wrong has been committed. No direct action for the denial of the right secured by the contract will lie."

In the case of the State of *South Carolina vs. Edward B. Wesley*, supra, the Court says: "In addition, the record does not show that the averments of the suggestion were either proved or admitted, and it certainly cannot be contended that the Circuit Court ought to have arrested proceedings on a mere suggestion."

No. 176.

FILED
JAN 25 1900
JAMES H. MCKENNEY,
Clerk

SUPREME COURT OF THE UNITED STATES,

Brf. of Lyles for Appellant.

OCTOBER TERM, 1899.

Filed Jan. 25, 1900.

No. 176.

EDWARD B. WESLEY, APPELLANT,

vs.

HOWARD P. EELLS.

Appeal from the Circuit Court of the United States for the Northern District of Ohio.

ARGUMENT OF WM. H. LYLES,

Solicitor for Appellant.

17,237.

SUPREME COURT OF THE UNITED STATES,

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No. 176.

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17,237.

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1.

ABSTRACT OF CASE.

This appeal is taken from a decree of the Circuit Court of the United States for the Northern District of Ohio dismissing appellant's bill of complaint in court below against this defendant.

Complainant seeks the specific performance of a contract for the purchase of certain real estate situate in the City of Columbia, State of South Carolina, known as the Agricultural Hall property, more particularly described in the bill of complaint.

The decree of the court below correctly states the facts of the case, (Printed Record, pages 28-29), as follows, to wit:

"On December 24, 1890, the State of South Carolina being the owner of said Agricultural Hall property, the General Assembly of that State passed an Act providing for the sale of said property by the commissioners of the sinking fund of the State of South Carolina. Pursuant to that Act the property was sold at public auction on February 2, 1892, and was bid in by the complainant, by his attorney, for the sum of $16,165.00.

"By the terms of sale the purchaser was required to pay in cash one-third of the purchase price, and to execute his bond and mortgage of the premises to secure the balance of the purchase price, in two equal annual installments, with interest from the date of sale, the obligor to have the option of paying the whole or any part of the indebtedness so to be secured at any time before its maturity.

"Complainant caused the deed for the premises to be made to one J. W. Alexander, who consented to act as trustee for him for the purchase of the premises, and the deed was duly executed and delivered by the commissioners of the sinking fund to Alexander in fee-simple without a declaration of the trust. Alexander executed and delivered to the treasurer of

the State of South Carolina his bond in the penal sum of $21,553.34, conditioned for the payment of $10,776.67 in two equal annual installments from the date of the bond, with interest payable annually. It was provided in the bond that Alexander should have the privilege of paying the whole or any part of the amount secured by the bond before maturity. The bond and mortgage and deed of conveyance were dated the 2d of February, 1892, the day of sale.

"On the 16th day of February, 1892, complainant Wesley, being the owner and holder of a large amount of revenue bond scrip of the State of South Carolina, furnished to the said Alexander an amount thereof, which, at its par value, was more than sufficient to cover the amount due the State of South Carolina on said bond and mortgage, and Alexander, through his attorneys, exercising the power given him by the terms and conditions of his bond to the State, duly tendered to W. T. C. Bates, State treasurer of South Carolina, the full amount due thereon, including interest. Bates had the custody and possession of the bond and mortgage and was the officer designated by law to receive the amount of the bond and mortgage, he being the obligee named in the bond. The tender was refused.

"By the laws of South Carolina a tender in full of the amount of money due to a mortgagee secured by a mortgage of personal or real property at any time when the mortgagor has a right to pay the same operates as a satisfaction and extinguishment of the lien of the mortgage securing the payment of such money, whether the amount so tendered be accepted or not and whether the mortgagor shall keep himself in position to make good the tender or not.

Salinas vs. Ellis, 26 S. C., 337.

"After tender was made by Alexander the State treasurer caused the mortgage given by Alexander to be filed for record in the office of the Register of Mesne Conveyances for Richland County, South Carolina. The mortgage still stands of record unsatisfied.

"On February 15, 1893, Alexander conveyed said Agricultural Hall property to complainant at his request.

"In October, 1897, complainant entered into a contract with Howard P. Eells, defendant herein, whereby he agreed to convey said Agricultural Hall property to said Eells, free from any valid lien or encumbrance whatever, at and for the price of twenty thousand dollars in cash. The premises are now and were at the time of making the contract of the value of twenty thousand dollars. Complainant is ready and willing to deliver to defendant a good and sufficient deed in law to convey the said premises to him in fee-simple. Defendant refuses to receive said deed and pay the purchase price, contending that the revenue bond scrip tendered by Alexander in payment of the amount due on the bond and mortgage was not a valid obligation of the State of South Carolina, and consequently did not constitute a legal tender for the debt and did not operate as an extinguishment of the lien of the mortgage. There are no other liens upon said property except some unentered taxes due the State of South Carolina, which amount complainant is willing that defendant retain out of the purchase price of the premises when ascertained.

"It is admitted that if the revenue bond scrip tendered by Alexander was valid and receivable for dues to the State of South Carolina, the lien of the mortgage was extinguished by its tender; but defendant claims that the revenue bond scrip was in its inception invalid and unconstitutional, constituted no claim against the State of South Carolina, and that its tender was a mere nullity."

The decree then proceeds to review the facts connected with the issuing of the revenue bond scrip referred to and then concludes as follows, to wit: (Printed Record, page 41).

"The opinion of this court is that the South Carolina bond scrip issued under and in pursuance of the Act of March 2, 1872, are bills of credit, within the prohibition of the Constitution of the United States, and, therefore, void.

"The tender of the scrip by Alexander to the State treasurer

of South Carolina was not a valid tender and did not operate to extinguish the mortgage given by Alexander to the State. The said Agricultural Hall property is still encumbered by the mortgage and complainant cannot give defendant a clear title to it. Complainant is not entitled to relief asked in the bill of complaint.

"The conclusion we have arrived at makes it unnecessary to determine the question of the violation of the Constitution of South Carolina in the enactment of the law providing for the issue of the scrip certificates.

"The bill of complaint is dismissed at complainant's costs."

2.

The appellant duly sued out an appeal to this court upon the following assignment of errors, to wit: (Printed Record, page 43):

1. "Because His Honor held that the South Carolina bond scrip issued under and in pursuance of the Act of March 2, 1872, are bills of credit within the prohibition of the Constitution of the United States, and, therefore, void, when he should have held that said bond scrip did not constitute bills of credit within the prohibition of the Constitution of the United States.

2. "Because His Honor held that the tender of the scrip by Alexander to the State treasurer of South Carolina was not a valid tender and did not operate to extinguish the mortgage given by Alexander to the State—and that the said Agricultural Hall property is still encumbered by the mortgage, and complainant cannot give defendant a clear title to it—when he should have held that the tender of the scrip by Alexander to the State treasurer of South Carolina was a valid tender and extinguished the lien of the mortgage referred to.

3. "Because His Honor held that 'complainant is not entitled to relief asked in the bill of complaint.'"

The questions for consideration by this court then are as to the validity of the revenue bond scrip of the State of South

Carolina, above referred to, as affected by the inhibition of the Constitution of the United States against the issuing by the several States of bills of credit.

(a.)

3.

ARGUMENT.

It is respectfully submitted that the only questions to be considered by this court are the questions arising upon the assignment of errors on the part of appellant which go to the correctness of the ruling of the court below that the scrip constitutes bills of credit emitted by the State of South Carolina in violation of Section 1, Article 10, of the Constitution of the United States, but counsel for appellee urged in the court below and repeats in his argument in this court the objection that the act authorizing the issue of the scrip was in contravention of Sections 7, 10 and 14 of Article 9 of the Constitution of South Carolina, as well as in contravention of the Federal Constitution, and this position will now be considered.

"Section 7. For the purpose of defraying extraordinary expenditures, the State may contract public debts; but such debts shall be authorized by law for some single object, to be distinctly specified therein; and no such law shall take effect until it shall have been passed by a vote of two-thirds of the members of each branch of the General Assembly, to be recorded by yeas and nays on the journals of each house respectively; and every such law shall levy a tax annually sufficient to pay the annual interest of such debt."

"Section 10. No scrip, certificate, or other evidence of a State indebtedness shall be issued, except for the redemption of stock, bonds, or other evidences of indebtedness previously issued, or for such debts as are expressly authorized in this Constitution."

"Section 14. Any debt contracted by the State shall be by loan on State bonds of amounts not less than fifty dollars each,

on interest, payable within twenty years after the final passage of the law authorizing such debt. "A correct registry of all bonds shall be kept by the Treasurer in numerical order, so as always to exhibit the number and amount paid, and to whom severally made payable."

I.

In considering the objections under the Constitution of South Carolina it must be borne in mind that the Constitution under which it arises was the one ratified April 10, 1868, and that prior thereto there was no limitation to the power of the Legislature to incur obligations or impose taxes, and up to that date the State had freely undertaken to aid railroad enterprises. Besides, the Charleston and Savannah Railroad Company, lying in the coast region of the State, whose bonds she had guaranteed, she had largely aided the construction of a system of roads extending from Columbia, the Capital of the State, to the foot of the mountains on its Northwestern border. This system consisted of the Greenville and Columbia Railroad, of about one hundred and fifty miles in length, reaching to Greenville and Anderson; and the Spartanburg and Union Railroad, of ninety-three miles in length, which, connecting with the Greenville and Columbia at a point twenty-five miles from Columbia, extended to Spartanburg.

The State had guaranteed the payment of a large amount of the bonds issued by each of these roads.

See *The State* vs. *The Spartanburg and Union R. R. Co.*, 8 S. C., 129 and *Gibbes* vs. *The Greenville and Columbia R. R Co.*, 13 S. C., 228.

The Legislature of the State and its people deemed it of vital importance to the welfare of the State that that system of roads should be extended across the mountains into Tennessee, and the Blue Ridge Railroad was designed for that purpose, to begin at Anderson and to extend to Knoxville, Tennessee.

In 1852, (12 Stat. 182), an Act was passed to incorporate a company to build it. The Act contained a preamble as follows, to wit:

"Whereas the State of Georgia has granted to the Blue Ridge Railroad Company a charter for the construction of a railroad from a point on the boundary line between North Carolina and Georgia, called the Locust Stake, by the most practicable route to Clayton, in Rabun County, to connect with the South Carolina Railroads at Anderson Court House; and whereas it is highly expedient, as well for the interest of a large portion of the people of North Carolina, Tennessee and Georgia, as of South Carolina, that such a railroad communication should be established, but such communication cannot be effected without the co-operation of this State, in opening a way for the same along that part of the proposed route which is in South Carolina," and then pledged the State to the guarantee of the bonds of the company to the extent of one million two hundred and fifty thousand dollars.

By an Act entitled "An Act to Authorize Aid to the Blue Ridge Railroad in South Carolina," approved 21st December, 1854, the Comptroller General was authorized, upon certain conditions, to subscribe the sum of one million dollars on behalf of the State to the capital stock of the Blue Ridge Railroad Company, and it was provided, (12 Stat. 327, Sec 3), "That the State shall have the same rights in the company and in its management as is reserved to private shareholders; and the General Assembly shall at all times have authority to examine into its condition; and the said company shall annually submit to the General Assembly a report exhibiting the condition of its affairs and its prospects." This Act repealed the provisions of the Act of 1852 as to the guarantee of the bonds of the Blue Ridge Railroad, and authorized the guaranty of one million dollars of the bonds of the company instead.

By an Act approved December 22, 1859, (12 Stat. 651), the boards of commissioners of roads of the upper Districts of the State were authorized to subscribe to the stock of the Blue

Ridge Railroad Company. And by an Act approved the 22d day of December, 1859,.(12 Stat. 654), entitled "An Act to Grant Additional Aid to the Blue Ridge Railroad," it was enacted:

"I. BE IT ENACTED by the Senate and House of Representatives now met and sitting in General Assembly, and by the authority of the same, That the Comptroller General is hereby authorized and directed to subscribe three hundred and ten thousand dollars to the stock of the Blue Ridge Railroad Company in South Carolina, for the purpose of completing the said road to Walhalla: PROVIDED, That the aid granted by this Act shall not be construed to exhonerate the stockholders from paying up their subscriptions to the capital stock of the said company, but the company shall call in and apply the same according to the provisions of their charter.

"II. That the said sum shall be paid to the company in bonds of the State, payable in five years, at six per cent. interest per annum, to be signed by the Comptroller General, and issued to the said company upon the making of the said subscription.

"III. The faith and funds of the State, and more especially the amount now due to this State by the General Government of the United States for various claims on the said United States for Revolutionary services, and matters growing out of the Florida war, and other matters through the agent of the State, lately accredited to the said government, are hereby pledged for the redemption of the principal and interest of the said bonds.

"IV. All the moneys arising from the subscription under this Act shall be applied by the said company towards completing the road to Walhalla, and equipping the same for use."

Under these Acts the State of South Carolina became the largest stockholder in the Blue Ridge Railroad company, and in 1868 found the company, like all other Southern enterprises, in greatly straightened circumstances. The Governor of the

State in that year, by his annual message, called the attention of the Legislature to the condition of the company, and it promptly passed the Act entitled "*An Act to Authorize Additional Aid to the Blue Ridge Railroad Company in South Carolina*," found in 14 Stat., at page 25. This is the Act under which the four millions of dollars of bonds guaranteed by the State were issued, and I beg to refer to the Act itself as found in the printed volume of the statutes. These bonds were issued with the guaranty of the State endorsed, and were largely pledged to parties in New York and elsewhere for money advanced to the Blue Ridge Railroad Company. The law of South Carolina is that bonds issued under the terms of such an Act as the one in question, may be issued by pledge as well as by sale. It was so ruled in the Bond Debt cases, 12 S. C., page 201.

"Whether a State debt shall be contracted by sale of its bonds, or by their deposit as collateral security for its loan, are not prescribed in the Constitution and are, therefore, left to the discretion of the Legislature." The language of the court itself is found at page 292.

It will be observed that the Act of 1868 prescribed only that the said bonds, or any part thereof shall not be *used* unless upon the express condition that upon application to the Congress of the United States or to private capitalists the amount of three millions of dollars in currency, or so much of that sum *as may be necessary* shall be furnished in exchange or *upon the security of said bonds.*

The Act clearly contemplated the immediate delivery of the bonds upon endorsement to the company, and it was enjoined not to use them except upon the condition stated. The "*necessity*" for which they were to be sold or pledged was to be judged of by the company and no conditions whatever were imposed upon the use of the first one million dollars.

In the Bond Debt cases, 12 S. C., 200, the following principles were settled:

"5. States issuing negotiable securities incur the same re-

sponsibilities which attach to individuals and corporations in like cases.

"6. The holder of State bonds and coupons is presumed, in the absence of proof to the contrary, to have taken them under-due for a valuable consideration, and without notice of any objection to which they were liable.

"7. Bonds issued by a State through its duly authorized officers under the authority of its laws, professing upon their face that the conditions imposed by the statute authorizing their issue have been complied with, and are valid obligations of the State in the hands of *bona fide* purchasers, although such conditions were not complied with, or, although in their issue gross frauds were perpetrated by the agents of the State."

Cases Considered.

The language of the court upon these points is found at pp. 272-277. Amongst other things, it is there said:

"We think, therefore, that the result of the cases in the Supreme Court of the United States clearly is, that when an Act of the Legislature authorizes the issue of bonds by a municipal corporation upon certain conditions therein named, and the bonds are issued by the proper officers of such corporation, containing a recital that they are issued under the authority conferred by such Act, that such recital is conclusive in favor of a *bona fide* holder—that all the necessary conditions named in the Act have been complied with, as a purchaser is not bound to look beyond the legislative Act and the recitals contained in the bonds. As was said in Marcy vs. Oswegom, 92 U. S., 641: 'the subsequent issue of the bonds containing the recital above quoted—that they were issued 'by virtue of, and in accordance with the legislative Act, and in 'pursuance of, and in accordance with, the vote of three-fifths of the legal voters of the township'—was another determination, not only of the result of the popular vote, *but that all the facts existed which the statute required in order to justify the issue of the bonds.*"

There is, however, a very strong case in which these principles were applied to bonds issued by a State. *California vs. Wells, Fargo & Co.*, 15 Cal., 236. In that case certain warrants which had been issued by the proper authorities of the State were paid and deposited in the office of the State treasurer. The warrants were afterwards stolen and presented to the treasurer to be funded under the provisions of an Act entitled 'An Act to provide for paying certain equitable claims against the State.' Bonds were issued in exchange for the stolen warrants, the treasurer not knowing at the time that they had been stolen. Subsequently, discovering this fact, he demanded the surrender of the bonds, and, upon refusal, brought this suit. There was no allegation or proof that the defendants knew the facts showing the fraud. It was held that, the warrants being negotiable paper, the bonds issued in exchange for them were valid debts in the hands of innocent holders, as the defendants were declared to be, in the absence of any proof to the contrary."

Was the Act of 1868 Constitutional? We submit that it was.

(a). Because a general delegation of the entire legislative power of the people was made by Article 2 Section 1, of the Constitution to the General Assembly, and where there is no express modification of the power it extends to all subjects which had been within its range before the Constitution. Now we have seen that not only had the credit of the State been occasionally lent to railroad corporations, but as to this system of road it was the settled policy of the State to do so, and it was recognized as creating a contingent liability but not a "*public debt*" of the character contemplated by Secs. 7 and 14 of Article 9, for these sections contemplated debts of the character upon which interest had to be paid.

The term debts is not used as the equivalent of the term liabilities, and the only object of those sections was to prescribe the manner in which the liabilities of the State, adjusted and fixed beyond question, should be evidenced as debts.

(b). The Legislature in 1869, under the Constitution in question, directed the guaranty of the bonds of the Charleston and

Savannah Railroad Company, by an Act passed just as was the Act of 1868, and that Act was recognized as of binding force by the Supreme Court of South Carolina in the case of Hand vs. C & S R. R. Co., 12 S. C., 314.

(c). Article 16 of the Constitution, adopted as an amendment in 1873, provides:

"PUBLIC DEBT—VOTE OF PEOPLE—To the end that the public debt of South Carolina may not hereafter be increased, without the due consideration and free consent of the people of the State, the General Assembly is hereby forbidden to create any further debt or obligation, either by the *loan of the credit of the State, by guaranty, endorsement, or otherwise*, except for the ordinary and current business of the State, without first submitting the question as to the creation of any such new debt, guaranty, endorsement, or loan of its credit, to the people of this State, at a general election; and, unless two-thirds of the qualified voters of this State, voting on the question, shall be in favor of a further debt, guaranty, endorsement or loan of its credit, none such shall be created or made."

The amendment adopted by the people, the authors of the Constitution of 1868 itself, fully recognized that prior to the adoption of the amendment obligations of the State might have been contracted by the Legislature by the loan of the credit of the State, or by guaranty, by endorsement, or otherwise, certainly the construction placed upon the Constitution by its authors is binding upon the courts.

Even, however, if the Act of 1868 did violate any of the provisions of the Constitution in the respects referred to, that of 1872 was free from those objections.

(a). It was passed as an Act creating a public debt of the State. See Senate Journal, Sessions of 1871-72, pp. 526-572. See House Journal, Sessions 1871-72, pp. 544-546.

State vs. Cardoza, Treas., 5 S. C. 297.

Bond Debt Cases, 12 S. C. 200.

(b). By Sec. 4 of Art. 14 of the Constitution, it was provided:

"The General Assembly may direct by law in what manner claims against the State may be established and adjusted." That is to say, the Legislature itself might recognize the validity of a claim and establish it as such of its own will, and was the Supreme Judge as to whether the conditions attached to the use of the bonds guaranteed under the Act of 1868 had been complied with. Certain it was that as to at least $1,000,000 of these bonds no conditions had been imposed, and they had gotten into the hands of innocent holders. Whether the State of South Carolina was legally bound by their provisions was not the question. The question was whether its liability was of such a character as to be recognized by the legislative authority as a claim against the State.

The Bond Debt Cases, 12 S. C., 284, ruled: "Bonds of the State issued in payment of outstanding bills receivable, for which the State had received value, are valid and binding obligations, even though such bills should be considered bills of credit, the Constitution of the United States does not prohibit a State from paying bills of credit, and the court said:

"If, however, these bills are of the character claimed for them, it may be that they would be invalid and worthless as legal obligations in the hands of those who happened to hold them, and that if the question were whether the payment of such bills could be enforced, or whether the officers of the State should be restrained from issuing them, the position taken by the Attorney General would be entitled to great consideration. Such, however, is not the question. It is not, and cannot be denied that these bills were issued by the proper officers of the State, under an Act of the General Assembly purporting to confer authority for so doing, and that the State received full value for them. When the State government was reorganized in 1868, they found these bills outstanding, and, even though it should be admitted that they were unconstitutional in form, they nevertheless represented valid and *bona fide* indebtedness of the State. If the State saw fit, voluntarily to recognize such indebtedness, even though it stood in a form

which its legal obligation, and provided for paying it or funding it in a form to which there could be no constitutional objection, we cannot conceive how such an Act on the part of the State, in conformity as it was, to the plainest dictates of common honesty, can be regarded as in violation of the Constitution of the United States. So far from emitting or issuing paper supposed to be within the prohibition of that Constitution, the State, on the contrary, made provision for the withdrawal of such paper from circulation, and replacing it with other evidences of indebtedness in a form which would not be amendable to such constitutional objection."

(c). That the contingent liability of the State represented by its guaranty on the bonds of the Blue Ridge Railroad Company was such a liability, was such evidences of indebtedness previously issued for which scrip, or certificates of State indebtedness might be issued, as was contemplated by Sec. 10 of Art. 9, is established beyond question by the Bond Debt Cases, supra:

"20. Bills of the Bank of the State of South Carolina—a corporation created by the State, and of which it was the only stockholder—issued, under the express authority of the State for its sole benefit, and to the payment of which the faith of the State was pledged, are 'evidences of indebtedness' within the meaning of the provisions of Sec. 10, Art. IX, of the Constitution, that 'no scrip * * * * shall be issued except for the redemption of stocks, bonds, or other evidences of indebtedness previously issued.' And bonds issued in exchange for such bank bills do not create a new debt."

The language of the court is found at p. 287, where it is said:

"It is quite true that these banks bills were not either stock or bonds of the State, but we were at a loss to conceive how any one can deny, in view of the provisions of the bank charter, that such bills were the 'evidence of indebtedness,' which, though not previously issued by a corporation created by the State, in which it was the sole stockholder, under express au-

thority from the State, for the sole benefit of the State. For the charter expressly provided that 'the faith of the State is hereby pledged for the support of the said bank, and to supply any deficiency in the funds especially pledged and to make good all losses arising from such deficiency.' "

The Act of 1872 having been passed by a two-thirds vote, and having complied with all the provisions of the Constitution with reference to Acts creating public debts, was itself a validation of all Acts done under the Act of 1868, and a waiver of any irregularities in the issuance of those bonds.

(4). The question as to the validity of the revenue bond scrip, so far as it is affected by the Constitution of the State of South Carolina, has been twice before the Supreme Court of that State, and although the court has held the scrip invalid as in violation of the Constitution of the United States, it has been silent with reference to the question under the Constitution of South Carolina, and a fair argument may be drawn by inference from such silence, that the court considered the scrip as not in violation of the Constitution of South Carolina.

See the cases of *State ex rel. Shiver* vs. *Comptroller General*, 4 S. C. 185, and the case of *Auditor* vs. *Treasurer*, same vol. p. 311.

It has likewise been twice before the United States Supreme Court, and that court, while deciding the cases against the holders of the scrip, does so merely upon the ground that the cases were actions against the State of South Carolina, and the bills in each case were dismissed for want of jurisdiction without prejudice to the claimant to renew his action. *Williams* vs. *Hagood*, 98 U. S. 72. *Hagood* vs. *Southern*, 117 U. S. 52.

(b.)

This brings us to the important question of the case. Was the revenue bond scrip emitted by the State of South Carolina as bills of credit in violation of the Constitution of the United States?

His Honor, the Circuit Judge, so held and the errors assigned by appellant question the correctness of that ruling.

At the risk somewhat of a repetition I would here again call the attention of the court to the facts of the case:

Prior to 1860 it had been the policy of the State of South Carolina to aid in the construction of the Blue Ridge Railroad. She became by far the largest stockholder in that company. She had by the Act of 1854 directed the Comptroller General, upon certain conditions, to endorse the guaranty of the State upon $1,000,000 of the company's bonds. The result of the war had greatly embarrassed the company, and in 1868 the Legislature waived the conditions precedent to the guaranty of the $1,000,000 of the bonds authorized by the Act of 1854, and also directed the endorsement of the guaranty of the State upon an additional $3,000,000 of the bonds of the company. These $4,000,000 of the bonds of the company, with the guaranty of the State endorsed, had, in 1872, been issued and were practically all outstanding, and were probably in the hands of bona fide holders. One million dollars of them the Legislature had authorized to be issued without condition; $3,000,000 of them had been issued by the officers of the State, who were judges as to whether the conditions had been performed.

In the Bond Debt cases 12, S. C. p. 200, the Supreme Court of South Carolina, has settled the following principles:

"5 States issuing negotiable securities incur the same responsibilities which attach to individuals and corporations in like cases.

"6 The holder of State bonds and coupons is presumed, in the absence of proof to the contrary, to have taken them underdue for a valuable consideration and without notice of any objection to which they were liable.

"7. Bonds issued by a State through its duly authorized officers under the authority of its laws, professing upon their face that the conditions imposed by the statute authorizing their issue have been complied with, and are valid obligations of the State in the hands of bona fide purchasers, although such conditions were not complied with, or although in their issue gross frauds were perpetrated by the agents of the State."

Those bonds being so outstanding and almost certainly binding upon the State, the Act of 1872 was passed authorizing the issue of $1,800,000 of revenue bond scrip to take up and retire the $4,000,000 of railroad bonds; Mr. Wesley was applied to, to advance the sum of money necessary to redeem and retire the $4,000,000 of railroad bonds, and after some hesitation consented to do so and advanced $344,000 towards the accomplishment of that purpose.

At the session of the General Assembly of the State of South Carolina held in 1890, a joint resolution was passed directing the Attorney General, Hon. Y. J. Pope, since elevated to the Supreme Bench of the State, and now the honored Senior Associate Justice of that court, to inquire into the validity of the claims made by Mr. Edward B. Wesley and Mr. Amos D. Williams. Attorney General Pope inquired into the circumstances of the transaction most exhaustively and filed a lengthy report to the General Assembly from which I make the following extracts:

"A HISTORY OF THESE CLAIMS THEMSELVES:

"Lest I may do an unintentional injustice to these claimants, I shall consider the claims separately, and this I feel I ought to do because from one standpoint, the claim of one occupies a better plane in my best judgment, and as I shall express the ground upon which I base this discrimination between the claimants hereafter, I shall content myself just now by expressing this as the reason for taking the claims up separately.

"I will first examine Mr. Wesley's claim: It was very evident I remarked sometime ago that the public—I mean the investors in public securities, had taken alarm at our money centres, in view of the rapid expansion of State securities. Hence soon after 2d, March, 1872, when the General Assembly of this State had passed the Act providing for the retirement and cancellation of the four million of Blue Ridge Railroad bonds guaranteed by the State and the issue therefor of the one million and eight hundred thousand dollars in revenue bond scrip,

we find in company with the State treasurer and the President of the Blue Ridge Railroad Company in the City of New York, two prominent bank presidents of our own State, two gentlemen who were then and have ever since been esteemed very highly and regarded as gentlemen of character and influence, I mean the late Col. L. D. Childs, President of the Carolina National Bank of Columbia, S. C., and Col. John B. Palmer, President of the Central National Bank of the same City. No doubt these gentlemen recognized the grave crisis in our State's financial condition and foresaw the wonderful effect retirement of $4,000,000 of public securities, (I say public because when the State guaranteed the payment of the same, pledging for that purpose her faith and credit, these bonds became of that character), would produce among financiers in the City of New York, they sought out Mr. Edward B. Wesley, who at that time did not own one dollar of this State's securities—indeed he had refused, representing a prominent banking house in New York, sometime before that, to consider any proposition for interesting himself in them.

It was represented to Mr. Wesley the great importance to the finances of the State to have these $4,000,000 Blue Ridge bonds retired and with an assurance that there should be placed in his hands $1,005,000 of the revenue bond scrip as collateral security for any money he should advance in the matter of withdrawing from hypothecation these Blue Ridge bonds. As a consequence he advanced the sum of three hundred and forty-four thousand nine hundred and twenty-five (344,925) dollars in actual cash, and with this sum he redeemed the sum of two million nine hundred and two thousand ($2,902,000) dollars of those Blue Ridge Railroad bonds with all their coupons attached, Mr. Wesley not only redeemed this large amount of such bonds, but he purchased a chisel and with his own hands so punctured these bonds and the coupons thereto attached that it was forever afterwards rendered impossible for any one to use them on the markets of the world; not only so, but he saw them shipped by express to the State treasurer, where I am glad to say they are now in the same mutilated condition.

Mr. Wesley received one million and five thousand dollars in revenue bond scrip, but he has always maintained that this scrip was merely a collateral. I find the same expression in the Supreme Court of the United States brief as I detected in his testimony before me in New York —Collateral—. Today with but a slight exception, that one million and five thousand dollars of revenue bond scrip is in the vaults of the Carolina National Bank in this city, where he has retained it, according to the testimony of Col Wilie Jones, since 1872 or 1873. I had it counted most carefully and the exact amount in the vaults of the bank is $996,840.

Mr. Wesley has not remained passive in his assertion of a claim against this State by reason of his expenditure of $344,-925. Before the revolution, 1876, he had repeatedly sought what he conceives is justice at the hand of the people's representatives in the Legislature of this State. Then efforts were made in the United States Courts culminating in two appeals to the Supreme Court of the United States. These two decisions of that tribunal will be found in Williams vs. Hagood, 98 U. S. Reports, page 72, and Williams and others vs. Hagood. 117 U. S. Reports, page 52. In the first case the opinion of the court is careful to allow another suit if these parties should so desire. The language of the court in that first cause was certainly encouraging—holding that the decision of our State Supreme Court in the case of the State ex relatione R. C. Shiver et al. vs. Hoge, as Comptroller General hereinbefore recited, bound no one as no holder of scrip was a party to the suit. And in the second suit, to which alone Mr. Wesley was a party, so far as the records disclose, the action is dismissed upon the sole ground that the State of South Carolina is a necessary (party) but could not be forced into court against her will under the eleventh amendment of the Constitution of the United States, whereby States are not liable to be sued except by their own consent.

Nowhere on the merits in either case is there any expression of that court that can be tortured into a depreciation of the claim of Mr. Edward B. Wesley or Amos D. Williams."

Thus it will be seen that, judged by the law officer of the State of South Carolina himself, the justice of Mr. Wesley's claim as a bona fide creditor of South Carolina cannot be questioned.

It is well established that the constitutional provision in question was adopted "in view of the great public and private mischiefs experienced during and prior to the period of the War of Independence, in consequence of unrestrained issues, by the Colonial and State Governments, of paper money, based alone upon credit," and the question as to whether particular evidences of indebtedness on the part of the several State Governments constituted bills of credit and were emitted in the manner inhibited by the Constitution has in a number of cases been before the Federal and State Courts of the land. I have endeavored to examine all of them. So far as my examination has gone, I give here a complete list of them:

Federal Cases:

Craig vs. Mo., 4 Peters, 410.
Byrns vs. Mo., 8 Peters, 40.
Briscoe vs. Commonwealth Bank, 11 Peters, 257.
Woodruff vs. Trapnall, 10 How., 205.
Darrington vs. Ala. Branch Bank, 13 How., 12.
Poindexter vs. Greenhow, 114 U. S., 270.
White vs. Greenhow, 114 U. S., 307.
Allen vs. B. etc., R. Co., 114 U. S., 311.
Chaffin vs. Taylor 114 U. S., 309.
McCay vs. Washington Co., 3. Wall., jr., (C. C.) 381.

State Cases:

Bailey vs. Milner, 35 Ga., 330.
Pagaud vs. State, 5 Smed. & M., (Miss.) 491.
Bond debt cases, 12 S. C., 200.
State vs. Billis, 2 McCord's Law, 14.
Ind. vs. Worram, 6 Hill, N. Y., 33. (40 Am. Dec., 378).
Central Bank vs. Little, 11 Ga., 346.
Ramsey vs. Cox, 28 Ark., 328.
Parham vs. Izard.

State vs. Cardoza, 5 S. C., 297.
People vs. Brie, 43, Hen., N. Y., 317. (105 N.Y., 618.)
City Nat. Bnk vs. Mahan, 21 La. An., 751.
Bragg vs. Tufts, 49 Ark., 554.

Of these cases the decision in the following were adverse to the validity of the evidences of indebtedness before the courts:

Craig vs. Mo.; Byrns vs. Mo.; City Nt. Bk. vs. Mahan, and Bragg vs. Tufts.

In all of the other cases the evidences of indebtedness were sustained. We need examine only those which were adverse and a few of those sustaining the bills; and the vast preponderance of the cases in which the bills have been sustained shows clearly that the courts of the land are adverse to declaring obligations of States void unless it is clear that the circumstances of their issue bring them within the definition of the term "emit."

In the case of *Poindexter vs Greenhow*, 114 U. S., 270, it is said: "The meaning of the term 'bills of credit,' as used in the Constitution, has been settled by decisions of this court. By a sound rule of interpretation it has been construed in the light of the historical circumstances which are known to have led to the adoption of the clause prohibiting their emission by the States, and in view of the great public and private mischiefs experienced during and prior to the period of the War of Independence, in consequence of unrestrained issues, by the Colonial and State governments, of paper money, based alone upon credit. The definition thus deduced was not founded on the *abstract meaning of the words*, so as to include everything in the nature of an obligation to pay money, reposing on the public faith, and subject to future redemption, *but was limited to those particular forms of evidences of debt which had been so abused to the detriment of both private and public interests.* Accordingly Chief Justice Marshall, in *Craig* vs. *Missouri*, 4 Pet., 410, 432, said that 'bills of credit signify a paper medium intended to circulated *between individuals*, and between government and individuals for the ordinary purposes of society.' This definition

was made more exact by merely expressing, however, its implication, in *Briscoe* vs. *Bank of Ky.*, 11 Pet., 257, 314, where it was said: 'The definition, then, which does include all classes of bills of credit emitted by the Colonies or States, is a paper issued by the sovereign power containing a pledge of its faith and designed to circulate as money.' And, again, (p. 318), 'To constitute a bill of credit, within the Constitution, it must be issued by a State, on the faith of the State, and be designed to circulate as money. It must be a paper which circulates on the credit of the State, and is so received and used in the ordinary business of life.' The definition was repeated in *Darrington* vs. *Bank of Ala.*, 13 How., 12."

Chief Justice Marshall, in the case of *Craig* vs. *Missouri*, 4 Pet., 431-32, makes it still more clear that the provision was not intended to limit the powers of the States to borrow money or arrange existing indebtedness and to issue therefor evidences of indebtedness in any form which might suit the convenience of parties; for he says: "In its enlarged, and perhaps its literal sense, the term 'bill of credit' may comprehend any instrument by which a State engages to pay money at a future day; *thus including a certificate given for money borrowed.* But the language of the Constitution itself, and the mischief to be prevented, which we know from the history of our country, *equally limit the interpretation of the terms. The word 'emit' is never employed in describing those contracts by which a State binds itself to pay money at a future day for services actually received, or for money borrowed for present use*; nor are *instruments executed for such purposes, in common language, denominated 'bills of credit.'* To 'emit bills of credit', conveys to the mind the idea of issuing paper intended to circulate through the community for its ordinary purposes, as money, which paper is redeemable at a future day. This is the sense in which the terms have always been understood," and that is the construction of the decision which is recognized by all subsequent decisions on the subject.

In Pagand vs State of Mississippi, 5 Smedes and M., 491, it was held:

"Auditors' warrants issued under the laws of this State making it the duty of 'the auditor of public accounts to settle, examine and audit all accounts, claims or demands whatsoever against the State, arising under any act or resolution of the Legislature, and to grant to every claimant authorized to receive the same, a warrant of the State treasury, are not bills of credit, even though such warrants may sometimes have been used by individual holders as a circulating medium and a substitute for paper money.

FORM OF THE WARRANTS.

48 115.

State of Miss. Auditor's office.

Pay to ———— $115, etc., and for so doing this shall be your warrant. Auditor.

To Treasurer.

"They were not issued to form a circulating medium for the community, nor to operate as a substitute for paper money. That they have been sometimes so used by individual holders cannot alter their legal effect. They are invariably an acknowledgement of indebtedness for services rendered, and to say they are repugnant to the Constitution and void would deprive the State of an important means which it has adopted to prevent impositions and frauds in the treasury.

"It was also urged as error that the court erred in rejecting the testimony which was proposed to be introduced in order to show that at the time the warrant was issued there was no money in the treasury to take it up. The warrants were not then redeemed; that they were under par, but circulated from hand to hand as money, and thus to show that they were bills of credit, etc."

In Central Bank vs. Little, 11 Ga., 351, it was said: "When

we look into the past history of our government we find that many of the States issued bills upon the *general credit* thereof, which circulated as money, without appropriating any *specific fund* for the payment or redemption of such bills. Bills of credit as contemplated by the Constitution, are such as are drawn or issued by the State *upon the general credit thereof without* the appropriation of any specific sum for the payment or ultimate redemption of such bills. In the one case the bills are based upon the *general credit of the State alone.* In the other, the bills are based on the credit of a certain *specific fund,* specially set apart and pledged for the payment of the bills authorized to be put in circulation as money.

The bills authorized to be issued by the charter of the Central Bank were not based upon the *general credit of the State,* but a *specific fund* was created for the payment thereof, consisting of the money in the State treasury, not then otherwise appropriated. This specific fund constituted the capital stock of the bank and was *pledged* for the payment of the bills and notes issued by the bank. The bills and notes, therefore, which were authorized to be issued by the Central Bank under the charter, were not based upon the general credit of the State, but upon the *specific fund* specially appropriated, set apart and *pledged* for the payment thereof. In other words, the bills were not *emitted* upon the general credit of the State as prohibited by the Constitution.

The State of Georgia being sole corporator and owner of capital stock of Central Bank. Gowen against Shute, 4 Baxter, (Tenn.), 57.

A bill of credit, such as a State is inhibited from issuing, is a bill drawn by the State and resting merely on its credit for payment. And a note or bill drawn by the State, the payment of which is to be made out of a fund pledged for that purpose, is not such a bill of credit.

On demand State of Mississippi will pay to bearer sum of ———— out of proceeds of cotton pledged for the redemption of this note, etc.

Ramsay vs. Cox, 28 Ark., 367.

Ramsay tendered Cox, an officer of the court, $15 in treasurer's certificates, which were refused.

The Act of 1868 provides for the issuance of eight percent. treasury certificates in small denominations and declares that "said certificates shall be receivable for all State taxes except taxes for school purposes and all other debts due the State."

"These certificates were not issued to circulate through the community for its ordinary purposes as money, but in every case they were issued as evidences of indebtedness on the part of the State to those to whom they were issued. We see nothing in this to give them the character of bills of credit. Nor we apprehend their circulation among the people on account of their value in the payment of taxes give them that character."

See the text 1 Kent Com. 408, (12 Ed., 1896), and note (a), where it is said: "Craig vs. The State of Missouri, 4 Peters, 410. In the case of Briscoe vs. The Bank of Kentucky, 11 Peters, 257, the question what were *bills of credit*, of which the emission was prohibited to the States, was extensively discussed. They were defined to be *paper issued by the authority of a State on the faith of the State, and designed to circulate as money*; and under this definition it was adjudged that a bank of the State of Kentucky, established in the name and on behalf of the State, under the direction of a president and twelve directors chosen by the Legislature, and the bank exclusively the property of the State, and with a capital of two millions, and with authority to issue notes payable to bearer on demand, and receive deposits and make loans; and the notes of which bank, by a subsequent Act, were to be received on executions by plaintiff, and if refused, further proceedings to be delayed on the judgment for two years, *was not within the prohibition in the Constitution of the United States against the emission of bills of credit*. Mr. Justice Story dissented from this decision, and said that the late Chief Justice Marshall was of opinion with him, when the same case was before the court, and argued at a pre-

ceding term; and he further said that he would not distinguish the case in principle from that of Craig vs. The State of Missouri. It appears to me, with great submission to the Supreme Court, that this decision essentially overrules the case of Craig, and greatly impairs the force and value of the constitutional prohibition. In the case of Linn vs. State Bank of Illinois, 1 Scam., 87, decided by the Supreme Court of that State in 1833, it appeared that the State Bank of Illinois was owned by the State, and authorized to issue notes or bills in small sums from twenty dollars to one dollar, drawing interest, and receivable in payment of debts due to the State; and that the Legislature were pledged to redeem the bills, and creditors were stayed from collecting their debts for three years, unless they would receive the bills in payment. The court held that the analogy was so striking between the institution and the Missouri loan office, as to render the decision in Craig vs. The State of Missouri in point, and binding on the States; and, consequently, it was adjudged that the Act establishing the State Bank of Illinois was unconstitutional and its notes void. And in the case of McFarland vs. The State Bank, 4 Ark., 44, the Supreme Court of Arkansas held itself bound and concluded by the decision in Briscoe vs. The Bank of Kentucky, though it was admitted to be inconsistent with the doctrine and decision in the prior case of Craig vs. The State of Missouri. The court evidently regretted that the case of Craig had been overruled, as it contained the sound and true constitutional doctrine. The Bank of Arkansas stood on the same ground, and had the same essential qualities, and its notes were bills of credit within the decision of Craig, and not bills of credit within the decision of Briscoe, and the latter decision they held themselves bound to obey."

In the case of the *State* vs. *Cardoza, Treas.*, 5 S. C., 309, it is said: "The first objection is that the certificates of indebtedness now demanded are 'bills of credit', within the meaning of the Constitution of the United States,' the subject has been so lately and fully considered by the court in *Shiver vs. Hoge*,

May Term, 1873, that it is not our purpose now to enlarge upon it. As was there said, the fact that the debt or obligation of the State might be readily received in the community in the payment of debts or purchase of commodies might not so impress the paper with the qualities which would render it obnoxious to the Constitution, for it is the *intention to create a currency—a circulating medium*—which invalidates the emission, and this must *be apparent from the whole scope of the Act*. That some of the said certificates of indebtedness were to be receivable in taxes due to the State affords no evidence of an intention on the part of the Legislature to create a currency or circulating medium. It was but a ready and legitimate mode of their payment or redemption, and exhibits no purpose of creating a medium by which the volume of circulation might be so increased as to produce all the evils of a redundant and excessive currency. There is no intention to do more than provide for the creditors, to whom the indebtedness of the State was admitted, the means of making their debts available in the payment of taxes, or even other dues to the State, provided there should be a deficiency in the supplies to meet the various appropriations they were expected to pay. The certificates in no way increased the obligation of the State, and, in fact, only constituted another admission by the General Assembly of the particular debt not paid by the certificate, but remaining due until its satisfaction was unconditionally acknowledged."

The Act itself is printed in full in the Circuit decree, pp. 30-32 of the Printed Record. An analysis of it shows clearly that it was not the purpose of the State of South Carolina to create a currency for circulation between individuals, or between the State and individuals. Its whole purpose was to relieve the State of South Carolina from a large burden of indebtedness and it only gave to the scrip, authorized to be issued, such incidents as would induce the holders of the old securities to take it in lieu of their holdings. The title of the Act declares its object to be "to relieve the State of South Carolina of liability for its guarantee of the bonds of the Blue Ridge

Railroad Company." The preamble shows the dire condition of the finances of the State and the danger *of* serious loss to it by failure to retire the bonds.

Section 1 directs the financial agent of the State in New York to immediately deliver to the State treasury all Blue Ridge Railroad bonds held by him for cancellation.

Sec. 2 directs that upon surrender of the balance of the $4,000,000 of bonds, with the guaranty of the State endorsed, the State treasurer is to deliver to the President of the Blue Ridge Railroad Company "Treasury certificates of indebtedness (styled revenue bond scrip), to the amount of $1,800,000, the said certificates to be executed in the manner hereinafter directed."

Sec. 3 directs the treasurer to have the certificates printed in such form and of such denomination as may be determined on by the State treasurer and the President of the Blue Ridge Railroad Company, and directs that such scrip should be signed by the State treasurer, and should "express that the sum mentioned therein is due by the State of South Carolina to the bearer thereof and that the same will will be received in payment of taxes and all other dues to the State except special taxes levied to pay interest on the public debt."

Sec. 4 pledges the faith and funds of the State to the redemption of the scrip; directs the county treasurers to receive the same in payment of all taxes levied by the State, and directs the State treasurer and other public officers to receive the same in payment of all dues to the State, and levies an annual tax of three (3) mills on the dollar in addition to the other taxes, on the assessed value of all taxable property in the State to be collected in the usual manner, and directs the State treasurer to retire one-fourth of the amount at the end of each year from the date of the scrip until all should be retired, and to apply to such purpose exclusively the tax levied under said section.

Sec. 5 provides that the treasurer might pay out any of the scrip received in payment for taxes.

Sec. 6 directs the cancellation of the Blue Ridge Railroad bonds delivered to the State.

Sec. 7 relieves the lien of the State upon the property of the Blue Ridge Railroad Company.

Sec. 8 authorizes the company to do certain things upon the acceptance of the provisions of the Act.

Sec. 9 prescribes a penalty for counterfeiting the scrip.

None of the qualities given to this scrip are other than such as has been decided in the cases of *Poindexter vs. Greenhow*, *State vs. Cardoza* and *Ramsay vs. Cox supra*, to be mere incidents of the debt. Surely where it is a matter of record, found in this case in the Circuit Decree, Printed Record, page 33, that "the exchange contemplated by this Act was effected; individuals holding the guaranteed bonds as collateral security for loans of money to the railroad company surrendered them and accepted in lieu thereof revenue bond scrip at the lower rate. Complainant Wesley advanced the sum of three hundred and forty-four thousand nine hundred and twenty-five dollars in cash, and with that sum two millions nine hundred and two thousand dollars of the said Blue Ridge Railroad bonds, with all their coupons attached, and delivered the same to the treasurer of the State of South Carolina, and the said bonds and attached coupons were mutilated and cancelled in accordance with the provisions of said Act. Wesley received from the State treasurer of South Carolina one million five thousand dollars of the said revenue bond scrip," it must be held that these certificates were issued, not for the purpose of creating a currency, but for the purpose of retiring a debt. The record shows, too, that as a matter of fact, the scrip has never gone into the hands of the public, but was delivered by the State treasurer directly to appellant and has since then been continuously held by him.

Much has been said about the form of the certificates, that is, that they are printed on small sheets of paper about the size of an ordinary bank bill. Surely there is nothing in the form of the paper upon which this scrip is printed, and even if so that

form was not prescribed by the Legislature. When it directed the treasurer to have it printed in such form as should be agreed upon between him and the President of the Blue Ridge Railroad Company, it certainly cannot be contemplated that it intended to authorize a form which would be obnoxious to law. It may be observed that there is no promise on the face of the paper itself of payment by the State, and this would seem to indicate that the persons who drew it contemplated that it should be what the Legislature intended it to be, merely a certificate of indebtedness receivable in payment of taxes and dues. Justice Matthews, in the case of *Hagood vs. Southern*, referred to this characteristic of the paper, and it is fair to infer that he did not consider the scrip to be bills of credit. He there says: "The peculiarity of the alleged contract deserves to be noted. The instrument, looked at as the sole evidence of the obligation, contains no promise whatever to pay money. It declares simply that it is receivable for the amount of money named, in payment of taxes and dues to the State, except special tax to pay interest on public debt. If it be read as containing the law which authorized its issue, it is a contract that it shall be redeemed, one-fourth of the whole amount each year, out of taxes specially to be levied for that purpose. Although styled in the law 'certificates of indebtedness,' there is no agreement generally to pay a named sum at a given time, in the usual form of public securities for the payment of money, nor even an express acknowledgement of an existing debt."

The Circuit Decree is based mainly upon the opinion of the Supreme Court of South Carolina in the cases of *State ex relatione Shiver vs. Comptroller General*, 4 S. C., 185, and *Dupre vs. County Treasurer*, 4 S. C., 311. These cases certainly are not binding upon any one either as adjudications or as authority. This court, by Justice Matthews, in the case of *Hagood vs. Southern*, 117 U. S., 52, has said: "It thus appears that a distinct issue is made by the State of South Carolina with the holders of this revenue bond scrip; and the controversy between them and the State involves the very question of the ex-

istence and obligation of the alleged contract. This controversy the State has undertaken to settle for itself. By its legislative department it has repealed the statutes authorizing its officers to execute the contract on its behalf, and forbidden the levy, collection and appropriation of taxes for the payment of the scrip. Through its judicial department it has declared, as between itself and its officers, that the instruments themselves are unconstitutional and void and without obligation. To this judgment, however, no holder of the scrip was a party, and, of course, it concludes no one." How the opinion of the Supreme Court of South Carolina in those two cases can be reconciled with the later case of the *State vs. Cardoza*, in 5 S. C., *supra* is difficult to explain.

Further, the redemption of the scrip did not depend wholly upon the good faith of the State for as between the State and the railroad company it was competent for the State to enforce its payment against the company. It was so ruled by this court in the case of *Hagood vs. Southern*, *supra*, where it says: "As between the railroad company and the State, the former is primarily liable for any debts represented by the revenue bond scrip, or for which it is held by others as security, and is bound to indemnify the State against loss on account of its suretyship." That was one of the issues ruled in that case and upon the strength of that the case was dismissed, because the railroad company had no right to tender the scrip in payment of its taxes,

There was also, by the Act of 1872, a special tax levied for the purpose of retiring one-fourth of the scrip annually, and in determining the intention of the Legislature from the scope of the Act itself, it is not to be presumed that such provision was made simply for the purpose of trapping the unwary, but it must be considered as showing a scheme on the part of the Legislature to compromise and liquidate a liability of uncertain *amount*, and to provide for its satisfaction in four equal annual installments without interest.

We respectfully submit that where, as it was on the tender *of*

the scrip in satisfaction of the mortgage debt, it was a question between the State of South Carolina and Mr. Wesley, from whom she had borrowed so large a sum of money upon the pledge of the scrip, it was not competent for her officers to set up her own supposed wrongful act against him, an innocent party.

Wherever any paper has been held obnoxious to the provision in question, the point has been raised in defence of some action brought by the government, or its financial agent, issuing the paper, against some one to whom it has been issued —cases clearly where the party was prevented from recovering on account of his own wrong. A successful defence in this case would establish that a sovereign State may, by such questionable acts, obtain large sums of money from an individual and repudiate its own liability by saying that its officers have issued the paper in violation of the Constitution of the United States.

In the case of the *State vs. The Pacific Guano Company*, 22 S. C., 50, It was held that "when the State comes into her own courts to assist a right of property, she is, of course, bound by all the rules established for the administration of justice between individuals.

In conclusion we would respectfully submit that there can be no doubt, indeed it is not a fact questioned, and it has never been questioned by the officers of the State of South Carolina, that the Appellant, Edward B. Wesley, in good faith, advanced to the State a large sum of money, and that if the State avoids the payment of the debt, it will be only by the sheerest technicality which her own courts, in the bond debt case, *supra*, have held she was not bound to resort to.

In *Woodruff vs. Trapnall* 10, How., 205, we find, (Syllabus):

"In 1836 the Legislature of Arkansas chartered a bank, the whole of the capital stock of which belonged to the State, and the president and directors of which are appointed by the General Assembly.

"The twenty-eighth section provided, 'That the bills and

notes of said institution should be received in all payments of debts due to the State of Arkansas. ' "

In January, 1845, this twenty-eighth section was repealed.

The notes of the bank which were in circulation at the time of this repeal, were not affected by it.

The undertaking of the State to receive the notes constituted a contract between the State and the holders of these notes, which the State was not at liberty to break, although notes issued by the bank after the repeal were not within the contract, and might be refused by the State.

Therefore, a tender, made in 1857, of notes issued by the bank prior to the repealing law of 1845, was good to satisfy a judgment obtained against the debtor by the State; and it makes no difference whether or not the debtor had the notes in his possession at the time when the repealing Act was passed."